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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. RICHARD PEREZ MOZQUEDA, Defendant and Appellant.	B148752 (Los Angeles County Super. Ct. No. VA061650)
In re RICHARD PEREZ MOZQUEDA, On Habeas Corpus.	B151746

ORIGINAL PROCEEDING; application for a writ of habeas corpus considered concurrently with an APPEAL from a judgment of the Superior Court of Los Angeles County. Raul A. Sahagun, Judge. Writ denied; judgment affirmed.

Linda Acaldo, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Mary E. Sanchez, Supervising Deputy Attorney General, and Myung J. Park, Deputy Attorney General, for Plaintiff and Respondent.

Ricardo Perez Mozqueda appeals from judgment entered following a jury trial in which he was convicted of second-degree robbery (Pen. Code, § 211) and battery with serious bodily injury (Pen. Code, § 243, subd. (d.)), the finding that during the commission of the robbery he had inflicted great bodily injury within the meaning of Penal Code section 12022.7, subdivision (a), and his admission that he had suffered a prior conviction within the meaning of Penal Code section 667.5. He contends the trial court denied his right to confront the witnesses against him and erroneously instructed the jury. He also filed a petition for writ of habeas corpus on July 24, 2001, in case number B151746, which we ordered to be considered with this appeal.

STATEMENT OF FACTS AND PROCEDURAL HISTORY[1]

On July 1, 2000, after Rodrigo Antonio Recinos (Recinos) withdrew money from the bank, he was followed by defendant and another man named Juan. Recinos knew the men because he had served food to them in the past at the Salvation Army. When Recinos walked past them, defendant hit Recinos from behind and Juan hit him from the front, causing him to fall to the ground. While on the ground, the men kicked him and broke his nose. After the attack Recinos realized he was missing more than $100 from his pocket.

Patricia Valenzuela witnessed the attack from the porch of her residence. She saw two men hitting another man, pulling him down to the ground and kicking and punching him and one man reaching into the victim's pocket. She crossed the street and told the men to stop. She was approximately 13 feet away from the attackers when she said this. She asked one of her relatives to call the police and she stayed with Recinos until the

[1] The trial court declared Rodrigo Antonio Recinos unavailable and allowed the reading of the transcript of his preliminary hearing testimony.

police and ambulance arrived. Recinos's nose was bleeding and swollen, and there was a lot of blood on the concrete. He lost consciousness for a while.

Huntington Park Police Officer David Edward Lopez responded to the call and observed Recinos on the ground, unconscious and with his head in a puddle of blood. As fire and rescue personnel arrived, Recinos regained consciousness and told Officer Lopez what had happened. He said he had known his attackers for several years from the Salvation Army, that he knew one as "Juan" and the other suspect "by seeing his face."

On September 20, 2000, Huntington Park Police Officer Lou Gosnell and a partner responded to the Salvation Army in Huntington Park because of a radio dispatch call that a robbery suspect had been seen there. Victim Recinos was present and pointed defendant out to Gosnell as the person who had robbed him. Gosnell walked over to defendant and asked him if he could step outside so they could talk. When defendant looked in the direction of Recinos, defendant said, "I didn't hit that guy." Prior to this statement, Gosnell had not said anything regarding the reason for the contact, that he was under arrest or that Recinos was accusing him of robbing him. Gosnell placed defendant under arrest for the robbery and while handcuffing him, heard defendant say, "I'm going to get out of prison someday, so watch out."

I.

READING OF VICTIM'S PRELIMINARY HEARING TESTIMONY

Appellant contends the trial court violated his Sixth Amendment right to confront the witnesses against him when it found that the prosecution had exercised due diligence sufficient to permit reading of the victim's preliminary hearing testimony.

On the day of trial, at a hearing to determine whether the prosecution could present victim Recinos's testimony to the jury by reading his preliminary hearing testimony, Robert Filter (Filter), senior investigator for the Los Angeles District

Attorney's office, testified that on January 12, four days earlier, he personally served Recinos with a subpoena. Filter explained to Recinos that he needed to appear in court the next Tuesday at 8:30 a.m. and Recinos indicated he understood what was required of him and that he would be present. On Tuesday, January 16, Filter did not see Recinos in court. After a body attachment was issued, Filter attempted to locate Recinos. Filter went to Recinos's residence on Cass Place, where Recinos had previously been served, and spoke to a woman, who lived there. She said Recinos had not been at the residence since the previous Friday, when he had been served, and suggested he go to the park at the Huntington Park Civic Center. Filter went to the park but did not find Recinos and spoke to another patron of the park who stated he did not know Recinos. Filter also went to the Huntington Park Police Department to check if Recinos was in custody and learned he was not. Filter also checked the countywide booking system to see if Recinos had been arrested and booked by any other agency in Los Angeles County and Filter found no record of an arrest or booking. Filter did not go back to the Salvation Army, because previously the pastor at the Salvation Army had said Recinos was staying at the Cass Place address. Recinos had given the Salvation Army address as his residence address in the police report and it was on the subpoena Filter had received. Filter left his business card with a man who was at the Cass Place address. The last attempt Filter made to locate Recinos was shortly before noon at the Huntington Park Police Department.

The court found witness Recinos unavailable, that he was properly served and did not appear pursuant to the properly executed and served subpoena. The court found further that the prosecution had exercised due diligence in attempting to secure his presence and permitted Recinos's preliminary hearing testimony to be read to the jury in lieu of his live testimony.

"The constitutional right implicated here is the right of an accused in a criminal prosecution 'to be confronted with the witnesses against him.' [Citations.] This confrontation right seeks 'to ensure that the defendant is able to conduct a "personal examination and cross- examination of the witness, in which [the defendant] has an

opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief."' [Citations.] To deny or significantly diminish this right deprives a defendant of the essential means of testing the credibility of the prosecution's witnesses, thus calling 'into question the ultimate "'integrity of the fact-finding process.'"' [Citation.] [¶] Notwithstanding the importance of the confrontation right, it is not absolute. [Citation.] Traditionally, there has been 'an exception to the confrontation requirement where a witness is unavailable and has given testimony at previous judicial proceedings against the same defendant [and] which was subject to cross-examination . . . .' [Citation.] Before the prosecution can introduce testimony from a prior judicial proceeding, however, it 'must . . . demonstrate the unavailability of' the witness. [Citation.] Generally, a witness is not unavailable for purposes of the right of confrontation 'unless the prosecutorial authorities have made a good-faith effort to obtain [the witness's] presence at trial.' . . . [¶] In California, the exception to the confrontation right for prior recorded testimony is codified in section 1291, subdivision (a), which provides: 'Evidence of former testimony is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and: [¶] . . . [¶] (2) The party against whom the former testimony is offered was a party to the action or proceeding in which the testimony was given and had the right and opportunity to cross-examine the declarant with an interest and motive similar to that which he has at the hearing.' A witness is unavailable if '[a]bsent from the hearing and the proponent of his or her statement has exercised reasonable diligence but has been unable to procure his or her attendance by the court's process.' [Citation.] Although section 240 refers to 'reasonable diligence,' [our Supreme Court] has often described the evaluation as one involving 'due diligence.' [Citations.]" (*People v. Cromer* (2001) 24 Cal.4th 889, 896-898.) "[A]ppellate courts should independently review a trial court's determination that the prosecution's failed efforts to locate an absent witness are sufficient to justify an exception to the defendant's

constitutionally guaranteed right of confrontation at trial." (*Id.* at p. 901, fn. omitted.) "'[D]ue diligence' is 'incapable of a mechanical definition,' but it 'connotes persevering application, untiring efforts in good earnest, efforts of a substantial character.' [Citations.] Relevant considerations include '"whether the search was timely begun"' [citation], the importance of the witness's testimony [citation], and whether leads were competently explored [citation]." (*Id.* at p. 904.)

Here the undisputed facts demonstrate that the prosecution exercised reasonable diligence to secure Recinos's attendance at defendant's trial. The Friday before trial, the prosecution had served the witness at his residence, had discussed what was required of the witness and received the witness's assurance that he would be present in court the next Tuesday for trial. When Recinos failed to appear in court on Tuesday, the trial was continued for one day and the district attorney's investigator immediately began a search to locate him. The investigator looked for Recinos at his residence. When told by a woman, who lived at the residence, that Recinos had not been home since he was served with the subpoena, the investigator left his business card at the residence and continued the search at a park at the Huntington Park Civic Center, a place Recinos was known to frequent. The investigator questioned one of the park patrons but got no information helpful in locating Recinos. Additionally, the investigator went to the Huntington Park Police Department to determine if Recinos was in custody and also checked the countywide booking system to see if he had been arrested and booked by any other agency in Los Angeles County.

"'What constitutes due diligence to secure the presence of a witness depends upon the facts of the individual case. [Citation.] The term is incapable of a mechanical definition. It has been said that the word "diligence" connotes persevering application, untiring efforts in good earnest, efforts of a substantial character. [Citation.] The totality of efforts of the proponent to achieve presence of the witness must be considered by the court. Prior decisions have taken into consideration not only the character of the proponent's affirmative efforts but such matters as whether he reasonably believed prior

to trial that the witness would appear willingly and therefore did not subpoena him when he was available [citation], whether the search was timely begun, and whether the witness would have been produced if reasonable diligence had been exercised [citation].' [Citation.]" (*People v. Sanders* (1995) 11 Cal.4th 475, 523.)

Here the attempts to find Recinos were limited to two days because of the date of the hearing to determine the witness's unavailability. Additionally, Recinos was not known to be a flight risk, he had previously appeared at the preliminary hearing and testified, he had been served with a subpoena several days before he was to appear at trial and he had assured the investigator he would be present at trial. Further, he was a civilian-victim, not facing criminal charges. Appellant's contention that the prosecution should have done more is irrelevant to our analysis. "'That additional efforts might have been made or other lines of inquiry pursued does not affect [our] conclusion. . . . It is enough that the [prosecution] used reasonable efforts to locate the witness.' [Citations.]" (*People v. Wise* (1994) 25 Cal.App.4th 339, 344.)

II.

PRIOR OUT-OF-COURT IDENTIFICATION TESTIMONY

Appellant contends the trial court violated his Sixth Amendment right to confront witnesses against him by permitting Police Officer Gosnell to describe Recinos prior out-of-court identification made of defendant. Appellant asserts that no foundation had been laid pursuant to Evidence Code section 1238 which provides that: "Evidence of a statement previously made by a witness is not made inadmissible by the hearsay rule if the statement would have been admissible if made by him while testifying and: [¶] (a) The statement is an identification of a party or another as a person who participated in a crime or other occurrence; [¶] (b) The statement was made at a time when the crime or other occurrence was fresh in the witness' memory; and [¶] (c) The evidence of the statement is offered after the witness testifies that he made the identification and that it was a true reflection of his opinion at that time."

Even if the foundational requirements for a prior identification were not all satisfied, the admission of the challenged evidence could not possibly have prejudiced defendant. (See *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1117-1118.) The evidence was cumulative of other evidence in the record demonstrating Recinos's identification of defendant. Recinos positively identified defendant at the preliminary hearing as one of his assailants and testified that he had known the defendant because he had served him food at the Salvation Army. While at the preliminary hearing, he did not specifically testify about his meeting with Officer Gosnell, he positively identified defendant as one of his assailants. Further, at the preliminary hearing, he was subject to significant cross-examination by the defendant, safeguarding defendant's Sixth Amendment right. (*People v. Brock* (1985) 38 Cal.3d 180, 189.)

III.

CALJIC NO. 17.41.1

Appellant contends the trial court erred by instructing the jury with CALJIC No. 17.41.1, in that it improperly chilled jury deliberations, improperly empowered the majority jurors to impose their will on the minority and impermissibly infringed on the power of jury nullification. The jury was instructed, "The integrity of a trial requires that jurors, at all times during their deliberations, conduct themselves as required by these instructions. Accordingly, should it occur that any juror refuses to deliberate or expresses an intention to disregard the law or to decide the case based on penalty or punishment, or any other improper basis, it is the obligation of the other jurors to immediately advise the Court of the situation."

There is no indication that the instruction had any bearing on the outcome of the case. The jury did not report to the court any juror's refusal to deliberate, any expression of intent to disregard the law, or any intent to decide the case based on penalty or punishment. Nor is there any evidence that these issues arose at all. Error if any in

giving the instruction was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18.)[2]

PETITION FOR WRIT OF HABEAS CORPUS

Pending this appeal, defendant filed a petition for writ of habeas corpus alleging he was denied effective assistance of counsel in Los Angeles County Superior Court case number VA061650. By order filed July 26, 2001, this court ordered the petition to be considered with the present appeal.

Petitioner claims he was denied his right to effective assistance of counsel in that counsel failed to interpose a constitutional objection to the erroneous admission of hearsay preliminary hearing testimony during trial and to the trial court's violation of his Sixth Amendment right by permitting police to describe the victim's prior out-of-court identification. We have carefully examined the petition and can only conclude that petitioner has failed to establish a prima facie case for relief. (*People v. Duvall* (1995) 9 Cal.4th 464, 474; *In re Clark* (1993) 5 Cal.4th 750, 781.) We deny the petition.

DISPOSITION

The judgment is affirmed. The petition for writ of habeas corpus is denied.

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LILLIE, P.J.

We concur:

JOHNSON, J. PERLUSS, J.

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[2] The issue of whether CALJIC No. 17.41.1 is constitutional is pending review before the California Supreme Court in several cases, including *People v. Taylor* (2000) 80 Cal.App.4th 804, 810-813, as modified May 22, 2000, review granted August 23, 2000 (S088909) and *People v. Engelman* (2000) 77 Cal.App.4th 1297, review granted April 26, 2000 (S086462).